

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RANDY J. NIELSEN,

Plaintiff and Appellant,

v.

SERVICE FIRST CONTRACTORS
NETWORK,

Defendant and Respondent.

G055724

(Super. Ct. No. 30-2017-00898374)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Timothy J. Stafford, Judge. Affirmed.

Randy J. Nielsen, in pro. per., for Plaintiff and Appellant.

No Appearance for Respondent.

*

*

*

Following an administrative hearing, the California Labor Commissioner (the Commissioner) awarded appellant Randy J. Nielsen \$1,479.92 in his wage and hour dispute with respondent Service First Contractors Network (Service First). Dissatisfied with the amount, Nielsen filed a notice of appeal, and requested a de novo trial in the superior court.

On May 22, 2017, the matter came on for trial. After hearing testimony from Nielsen and a representative of Service First, and “receiving” two exhibits,¹ the court took the matter under submission. Because there is no reporter’s transcript of the trial testimony, or an agreed or settled statement, we have no record of what was said at trial.

We do know that, later the same day, the trial court rendered its decision by minute order, stating: “The Court, having taken the above-entitled matter under submission on 05/22/2017 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows: [¶] After careful consideration of the oral testimony and the documents produced in this matter the Court finds that Appellant Randy Nielsen failed by the preponderance of evidence to establish any violation of the California Labor Code that would allow a judgment in his favor. [¶] Judgment for Respondent Service First Contractors Network, a California Corporation DBA Service First against Appellant Randy Nielsen. Appellant Randy Nielsen shall take nothing on his Appeal.” On June 5, the court clerk mailed a copy of the minute order to both parties.

¹ The record does not indicate these exhibits were admitted into evidence and we do not have them before us. From the minute order, we can discern that Nielsen’s exhibit was an e-mail and Service First’s exhibit was a “Detailed Audit Summary.” We asked the superior court to send us any exhibits in its records, and we were informed there were none.

On June 26, Nielsen filed a document captioned “Ex Parte: Consideration of Reversed Judgement.” He requested “reconsideration” of the trial court’s decision and asked for a “default judgment” against Service First for its purported failure to provide unidentified documents per his demand. He did not say how or when he had made such a demand, or include any proof. Nielsen asked the trial court “at minimum to review and reconsider 1st award which was granted by [the Commissioner],” as well as to consider other unspecified evidence. Nielsen provided no legal authority or argument supporting these requests. The trial court denied the motion for reconsideration without prejudice to Nielsen bringing a noticed motion.

On August 11, Nielsen filed a “Notice of Intention to Move to New Trial.” The grounds were: “(1) To complete the record” with documents Service First had not produced as requested by subpoena, and “newly discovered material”; “(2) Recover[] damages that were awarded by [the Commissioner] . . . and pointing out errors made [by the Commissioner] that reduced the award to less than expected”; and “(3) To prove misconduct by [Service First],” which had allegedly provided false records to the Commissioner and to the trial court.

Nielsen did not identify the referenced “documents,” or the “newly discovered material,” nor did he provide any copies. He did not allege or explain how or why the Commissioner’s original award was legally erroneous, or further describe the “false” records he claimed had been presented to the trial court and the Commissioner. Nielsen also failed to comply with Code of Civil Procedure section 659, subdivision (a), which requires a party moving for a new trial to designate whether the motion “will be made upon affidavits or the minutes of the court, or both.”

On August 17, the trial court calendared a “Motion for New Trial” for October 5. In the meantime, on August 23, counsel for Service First electronically transmitted a proposed judgment to the trial court, which was filed on September 1. The clerk served Service First with the filed judgment. Nothing in the record shows Nielsen

was ever served with the filed judgment, and since Service First has chosen not to make an appearance, we have no proof it served Nielsen.

On October 5, the new trial motion was heard. Again, there is no reporter's transcript or settled statement to show what evidence and argument was presented. The record reflects that Nielsen appeared in person, and Service First's counsel appeared telephonically. The court considered the parties' arguments, and unspecified "evidence" was "presented." Nothing in the record identifies this "evidence" or whether it was admitted.

The court issued a minute order stating: "The Court having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows: [¶] Appellant Randy Niels[e]n's Motion for New Trial is denied. The decision of the trial court, after the de novo hearing on appeal from the Labor Commissioner's decision on a wage claim, is subject to a conventional appeal to an appropriate appellate court. The appellate court review [sic] the facts presented to the trial court, which may include entirely new evidence. [Citations.]" The clerk was ordered to give notice to the parties, and did so on October 6.

On December 5, Nielsen filed a notice of appeal, purportedly from a "judgment" in favor of Service First after the October 5 "court trial."

DISCUSSION

1. *Appealability*

"Generally, no order or judgment in a civil action is appealable unless it is embraced within the list of appealable orders provided by statute.' [Citation.] . . . [Code Civ. Proc., § 904.1, subd. (a)(4)] makes appealable an order *granting* a new trial, but it has long been settled that an order *denying* a motion for new trial is not independently appealable and may be reviewed only on appeal from the underlying judgment." (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 19

(*Walker*).) Thus, Nielsen cannot appeal from the court’s October 5 order denying his new trial motion even though his notice of appeal purports to be from a “judgment” following an October 5 “court trial,” and not from the ruling on his new trial motion.

This might be the end of Nielsen’s appeal. But a “notice of appeal must be liberally construed” (Cal. Rules of Court, rule 8.100(a)(2) (subsequent rule references are to the Cal. Rules of Court)), and since “[t]he law aspires to respect substance over formalism and nomenclature” [citation], a reviewing court should construe a notice of appeal from an order denying a new trial to be an appeal from the underlying judgment when it is reasonably clear the appellant intended to appeal from the judgment and the respondent would not be misled or prejudiced.” (*Walker, supra*, 35 Cal.4th at p. 22; cf. *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 669 [“a notice of appeal which specifies a nonappealable order but *is timely* with respect to an existing appealable order or judgment will be construed to apply to the latter judgment or order”].)

As noted above, Service First has declined to make an appearance here. Nonetheless, the question remains whether Nielsen’s December 5 notice of appeal was timely vis-à-vis the trial court’s May 22 decision.

It is well settled that we lack jurisdiction to entertain tardy appeals. (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56.) “Under rule 8.104, a notice of appeal must be filed within 60 days after service (whether by the superior court clerk or by a party) of a notice of entry of judgment or a file-stamped copy of the judgment. [Citation.] If there is no notice, the notice of appeal must be filed within 180 days after ‘entry of judgment.’ [Citation.] For judgments, the judgment is ‘entered’ on the date of filing.” (*In re Marriage of Mosley* (2010) 190 Cal.App.4th 1096, 1101 (*Mosley*).)

Here, the clerk served the parties with the court’s May 22 minute order on June 5. The order did not instruct either party to prepare a judgment, and none was

entered. On August 23, Service First electronically transmitted a proposed judgment to the court, and it was filed on September 1. Thus, judgment was entered on September 1, 2017.

The clerk served Service First with a copy of the filed judgment, but neglected to serve Nielsen. The record before us does not reflect that Service First or the clerk of the court served Nielsen with a “Notice of Entry” or a filed-endorsed copy of the judgment.

“When both the court clerk and the party submitting the judgment fail to serve the statutorily mandated notice of entry of judgment, the sole consequence is that a longer statutory period for filing the notice of appeal comes into play. In other words, rather than the 60-day period that would have run from notice of entry of the judgment, an appellant has 180 days from entry of judgment to file the notice of appeal. [Citations.] The lack of notice does not jeopardize the judgment.” (*Kimball Avenue v. Franco* (2008) 162 Cal.App.4th 1224, 1228.)

As stated above, there is nothing in the record showing Nielsen was ever served with the judgment. Nielsen’s notice of appeal was therefore required to be filed within 180 days of the September 1 entry of judgment; it was filed on December 5 and this appeal is therefore timely.

2. *Standard of Review*

“It is a fundamental principle of appellate review that the factual findings of the trial court are presumed correct. [Citations.] . . . In the absence of a contrary showing in the record, all presumptions in favor of the trial court’s action will be made by the appellate court.” (*Construction Financial v. Perlite Plastering Co.* (1997) 53 Cal.App.4th 170, 179.) It is an appellant’s burden to demonstrate error, not merely to allege it. (Cf. *Virtanen v. O’Connell* (2006) 140 Cal.App.4th 688, 710.) Error must be prejudicial to require reversal. (Cal. Const., art. VI, § 13.) And “[t]he burden is on the

appellant in every case to show that the claimed error is prejudicial” (*In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337 (*McLaughlin*).)

By foregoing a reporter’s transcript or settled statement, Nielsen elected to proceed solely based on the clerk’s transcript (rules 8.121, 8.122), which we treat as an appeal on the “judgment roll.” (*Allen v. Toten* (1985) 172 Cal.App.3d 1079, 1082.) “On such an appeal, ‘[t]he question of the sufficiency of the evidence to support the findings is not open.’” (*Ibid.*) Instead, we “must conclusively presume that the evidence is ample to sustain” the trial court’s findings. (*Ehrler v. Ehrler* (1981) 126 Cal.App.3d 147, 154.) As such, our review is limited to determining whether error appears on the face of the record presented to us.² (*National Secretarial Service, Inc. v. Froehlich* (1989) 210 Cal.App.3d 510, 521.) These rules of appellate procedure apply equally to self-represented parties. (Cf. *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985; *Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 638-639 [litigants representing themselves in propria persona are held to the same standards as attorneys].)

It is also an appellant’s duty to comply with the California Rules of Court. Nielsen does not “present argument and authority on each point made” (*County of Sacramento v. Lackner* (1979) 97 Cal.App.3d 576, 591 (*Lackner*), and he fails to point out where in the record there is evidence demonstrating reversible error. (Rule 8.204(a)(1)(C); *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.) Accordingly, Nielsen’s factual and legal arguments have no corresponding support in the appellate record he brings to us.

² See rule 8.120, subd. (b): “If an appellant intends to raise any issue that requires consideration of the oral proceedings in the superior court, the record on appeal *must include* a record of these oral proceedings,” with either a reporter’s transcript, an agreed statement, or a settled statement. (*Italics added.*)

3. *Applicability to this Appeal*

If an employer fails to pay wages in the amount, time, or manner required by contract or statute, the employee may seek administrative relief by filing a wage claim with the Commissioner. That is what Nielsen did. Labor Code section 98 provides the procedures for resolving such a claim. (*Post v. Palo/Haklar & Associates* (2000) 23 Cal.4th 942, 946 (*Post*).)

Following such an administrative adjudication, either party “may seek review by filing an appeal to the superior court, where the appeal shall be heard *de novo*.” (Lab. Code, § 98.2, subd. (a).) Here, dissatisfied with the amount the Commissioner awarded, Nielsen filed an appeal from the award.

“Although denoted an ‘appeal,’ unlike a conventional appeal in a civil action, hearing under the Labor Code is *de novo*. [Citation.] “‘A hearing *de novo* [under Labor Code section 98.2] literally means a new hearing,” that is, a new trial.’ [Citation.] The decision of the commissioner is ‘entitled to no weight whatsoever, and the proceedings are truly “a trial anew in the fullest sense.”’ [Citation.] The decision of the trial court, after *de novo* hearing, is subject to a conventional appeal to an appropriate appellate court. [Citation.] Review is of the facts presented to the trial court, which may include entirely new evidence.” (*Post, supra*, 23 Cal.4th at pp. 947-948.)

Thus, “[u]nlike an appeal in a civil action, the appeal of the commissioner’s decision to the superior court under [Lab. Code, §] 98.2, subdivision (a) nullifies the [commissioner’s] decision, and the superior court conducts a new trial of the wage dispute. [Citation.] ‘The trial court “hears the matter, not as an appellate court, but as a court of original jurisdiction, with full power to hear and determine [the wage claim] as if it had never been before the labor commissioner.”’” (*Arias v. Kardoulis* (2012) 207 Cal.App.4th 1429, 1435.)

Our appellate review is limited to the evidence presented to the trial court, not to the Commissioner. (*Post, supra*, 23 Cal.4th at pp. 946-948.) Unfortunately, that evidence is not part of our record.

Nielsen appears to misunderstand our role, because he argues as if we are a court in which he may conduct another new trial. This appeal is not a retrial. (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58.) Put simply, because Nielsen has failed to provide us with a record showing what testimony, legal authority, and arguments were presented to the trial court, we are left with nothing to review. As a result, we have no basis to overturn the trial court's presumptively valid judgment.

In his "Statement of Facts," Nielsen makes a wide variety of allegations regarding what transpired at the Commissioner's administrative hearing, and what evidence Service First allegedly destroyed and did not produce at that hearing. But our review is limited to the evidence presented to the trial court. It does not include evidence presented at the Commissioner's administrative hearing. (*Post, supra*, 23 Cal.4th at pp. 946-948.)

Nielsen also argues that at the de novo trial, Service First's counsel gave the trial court false documents regarding his work history records. But there are no documents in the appellate record for us to review, nothing showing what the court did or did not examine. This appeal is from the de novo trial. Nothing in that record demonstrates the Commissioner's findings of fact and law were adopted, considered, or relied upon by the trial court. As a result, they are not properly before us.

Finally, Nielsen provides no legal authority for why the trial court's judgment must be overturned. He never discusses the trial itself. His failure to show us what happened at the trial, or to provide any legal authority demonstrating how he was prejudiced in that forum, leaves us unable to review the trial court's findings. (*McLaughlin, supra*, 82 Cal.App.4th at p. 337; *Lackner, supra*, 97 Cal.App.3d at p. 591.)

Nielsen acknowledges he understood “that without a record of the oral proceedings in the superior court, the Court of Appeal will not be able to consider what was said during those proceedings in determining whether an error was made in the superior court proceedings.” Nielsen insists Service First was not entitled to its judgment, and alleges irregularities not contained in the appellate record, but he does not show us how the trial court legally erred in reaching its judgment. His appeal therefore must fail.

4. *Nielsen’s Appellate Bond*

At oral argument, Nielsen informed us he was required to post a bond in order to appeal from the Commissioner’s award and that the bond has not been exonerated. He said he was informed by the superior court he needed to request that we exonerate it.

Our review of the record shows that on April 10, 2017, Commissioner Carmen Luege continued Nielsen’s de novo appeal, in part because Nielsen had not posted “a bond,” telling him “failure to post a bond prior to the next hearing will result in dismissal of this matter.”

On May 18, 2017, an “Undertaking Under Section 98.2(B) of the Labor Code” was filed, showing “SureTec Insurance Company” provided an appeal bond for Nielsen in the amount of \$1,479.92, as originally awarded by the Commissioner. The premium charged to Nielsen was \$250 per year.

Commissioner Luege’s order was erroneous because Labor Code section 98.2, subdivision (b), applies to *employers* who appeal from a Commissioner’s award, not *employees*. “As a condition to filing an appeal pursuant to this section, an *employer* shall first post an undertaking with the reviewing court in the amount of the order, decision, or award. . . . The *employer* shall provide written notification to the other parties and the Labor Commissioner of the posting of the undertaking. The undertaking shall be on the

condition that, if any judgment is entered in favor of the employee, the *employer* shall pay the amount owed pursuant to the judgment” (Lab. Code, § 98.2, subd. (b), italics added.)

No comparable provision applies to employees because “the purpose of this requirement is to discourage *employers* from filing frivolous appeals and from hiding assets in order to avoid enforcement of the judgment.”” (*Burkes v. Robertson* (2018) 26 Cal.App.5th 334, 342, italics added.) “This statutory regime therefore furthers the important and long-recognized public purpose of ensuring that workers are paid wages owed.” (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1131.)

Nielsen’s appeal bond must be exonerated.

DISPOSITION

The judgment is affirmed. Since Service First did not make an appearance, no costs are awarded. The superior court is ordered to exonerate Nielsen’s bond upon issuance of the remittitur.

GOETHALS, J.

WE CONCUR:

O’LEARY, P. J.

FYBEL, J.